

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, ET AL,
Plaintiffs,

CIVIL ACTION
Docket No: 1:14-264-JDL

-versus-

ANDREW WHEELER, Acting
Administrator, United States
Environmental Protection Agency,
et al.,
Defendants and

PENOBSCOT NATION, et al.
Defendants-Intervenors.

Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Motion Hearing** held before **THE HONORABLE JON D. LEVY**, United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 30th day of October, 2018 at 10:05 a.m. as follows:

Appearances:

For the Plaintiffs:	Scott Boak, Esquire Gerald Reid, Esquire
---------------------	---

For the Defendants:	David A. Carson, Esquire
---------------------	--------------------------

For Intervenor Defendants:	Cory J. Albright, Esquire Kaighn Smith, Jr., Esquire David M. Kallin, Esquire
----------------------------	---

Tammy L. Martell, RPR, CRR
Official Court Reporter

(Prepared from manual stenography and
computer aided transcription.)

1 (Open Court.)

2 THE COURT: Good morning. We are gathering in
3 the case of State of Maine versus Wheeler, et al. This
4 is Docket No. 14-cv-264.

5 Counsel, I would like you to identify yourselves for
6 our record. Beginning with the State.

7 MR. BOAK: Scott Boak on behalf of the State,
8 Your Honor. With me is Gerry Reid, but I will be doing
9 the speaking for the State today.

10 THE COURT: Thank you.

11 MR. CARSON: Good morning, Your Honor. David
12 Carson on behalf of the Environmental Protection Agency
13 and the other federal defendants.

14 THE COURT: Thank you.

15 MR. SMITH: Kaighn Smith, Jr., Your Honor, for
16 the Penobscot Nation. With me is David Kallin and
17 Melina Dumas. I will be doing the speaking for the
18 Penobscot Nation.

19 THE COURT: Thank you.

20 MR. ALBRIGHT: Good morning, Your Honor. Cory
21 J. Albright on behalf of the Houlton Band of Maliseet
22 Indians.

23 THE COURT: Thank you. There are two motions
24 that are before the Court. The first is the EPA's
25 motion for a voluntary remand, and the second is the

1 Penobscot Nation's motion to file a counterclaim. This
2 case has had a long and increasingly complex procedural
3 history that I want to summarize at the outset, and in
4 so doing point the attorneys to several of the key
5 questions that I have regarding your written
6 submissions. Or that I should say are generated by your
7 written submissions.

8 This case began in July of 2014. At that time the
9 State was challenging EPA's failure to approve or
10 disapprove certain revisions to Maine's surface water
11 quality standards pursuant to the Clean Water Act as
12 they apply to waters within Indian territories and
13 lands.

14 In February 2015 a hearing was held in the case on
15 the EPA's motion to dismiss for lack of jurisdiction and
16 competing motions for judgment on the pleadings, and
17 that hearing resulted in an order staying the case for a
18 period of 120 days based on EPA's representation that it
19 would, in fact, approve or disapprove the water quality
20 standards that were at issue within 60 days.

21 That, in fact, happened and a second amended
22 complaint was filed, and this case now concerns EPA's
23 decision in 2015 to disapprove a portion of Maine's
24 water quality standards under the Clean Water Act and
25 EPA's related interpretation and approval of the Maine

1 standards as including a designated use of sustenance
2 fishing in Indian waters.

3 So where the dispute previously focused on EPA's
4 failure to act on the water quality standards
5 promulgated by Maine, the focus now is on the lawfulness
6 of the decisions made by EPA.

7 In arriving at its decisions in 2015, EPA had the
8 benefit of a formal opinion from the Department of
9 Interior. The DO -- the Department of Interior opinion
10 letter recognized that federal Indian law supports the
11 interpretation of tribal fishing rights as including
12 sufficient water quality to effectuate that right. And
13 based in part on that principle EPA formally approved
14 most of Maine's water quality standards but disapproved
15 those that it found to be insufficiently protective of
16 tribal sustenance fishing rights in tribal waters.

17 In October 2015 Maine filed its second amended
18 complaint. Subsequently the parties submitted the
19 administrative record in this case. And in December of
20 2016 the Houlton Band of Maliseet Indians and the
21 Penobscot Nation were permitted to intervene as parties.

22 In November of 2016 this country held a presidential
23 election and there was a change in administrations, and
24 soon thereafter in February of 2017 Maine petitioned the
25 EPA to reconsider its decisions. This resulted in a

1 seven-month stay of this case between May and December
2 of 2017, and at the conclusion of the stay period that
3 had been approved by the Court EPA reported to the Court
4 that it had carefully considered the matter and it had
5 decided not to withdraw or otherwise change any of its
6 decisions that are challenged in this case, and so the
7 case moved forward.

8 In February 2018 the State filed its motion for
9 judgment on the administrative record and its 62 page
10 memorandum in support, and in July of 2018, five months
11 later, EPA filed the motion that's before the Court
12 today, that is the motion for voluntary remand and stay.

13 That motion indicates that the Environmental
14 Protection Agency has decided to change and not to
15 defend its earlier position in this case, and it gives
16 two reasons for the change of position.

17 First, subsequent to the 2017 stay, since then, EPA
18 has new key personnel who are responsible for these
19 questions within the agency.

20 And also, secondly, EPA has obtained a second
21 Department of Interior -- Interior formal opinion letter
22 which clarifies and appears to limit the reach of the
23 Department of Interior's 2015 opinion letter.

24 In seeking a remand and stay, EPA relies upon the
25 inherent authority that federal agencies have to

1 reconsider their decisions. Specifically the EPA's
2 motion indicates that it has decided to change its
3 earlier decisions in three areas which are cited in
4 paragraph three on page two of its motion.

5 I would note that these changes are not further
6 explained in any detail, and that it is not clear, from
7 what is addressed in paragraph three, what the full
8 scope of those changes will actually entail. And
9 perhaps that's because it is not yet known. But, in any
10 event, I would like the lawyers to understand that it is
11 not clear to me, having read the papers that have been
12 submitted, the scope of the changes that EPA is --
13 wishes to consider and probably adopt. Perhaps that can
14 be better developed today.

15 It does appear to me, however, from everything that
16 I have read, that these three changes largely relate to
17 and result from the Department of Interior's 2018
18 opinion letter.

19 The 2018 opinion letter is itself not part of the
20 administrative record of this case but has been filed
21 with the papers submitted to the Court in connection
22 with this motion. I think that it is fair to
23 characterize that opinion letter as to some degree
24 vague, but at least in two respects it is clear.

25 The first is that the Department of Interior is now

1 not able to identify federally protected tribal fishing
2 rights for the so-called northern tribes; The Houlton
3 Band of Maliseet Indians and the Aroostook Band of
4 Micmacs.

5 Second, the Department of Interior adopts a new
6 definition of the term sustenance as employed in the
7 Maine Indian Claims Settlement Act of 1980. So although
8 less than opaque, this letter adopts a narrower
9 definition that can be interpreted as eliminating the
10 taking of fish for commercial -- for commercial purposes
11 from the protected right to take fish for sustenance.

12 So both of these questions, first whether the
13 northern tribes have federally protected fishing rights,
14 and, secondly, the meaning of the term sustenance as
15 used in the Maine Indian Claims Settlement Act, appear
16 to me to be questions of law, not questions of fact or
17 policy. And I will be very interested to hear from the
18 lawyers today on -- on that very question and their
19 views about it.

20 I note that in responding to the EPA the tribes do
21 not squarely argue that the reasons behind the EPA's
22 request are pure questions of law. In fact, the
23 Penobscot Nation's characterized EPA's request for a
24 remand as arising from, quote, policy preferences, end
25 of quote. And the Houlton Band of Maliseet Indians

1 argues that the EPA has not suggested any legal errors
2 and that the DE -- Department of Interior's 2018 letter
3 does not disavow and in fact confirms the 2015 letter's
4 recognition of the Houlton Band's federally protected
5 fishing rights.

6 The EPA also argues that it does not confess having
7 made any legal errors and that a remand is required for
8 it to reconsider questions of policy.

9 In arguing against the tribes opposition to the
10 remand, EPA argues that if remand is granted its
11 decisions will then, quote, be anchored in a new and
12 full administrative record that will provide solid
13 footing for judicial review, end of quote.

14 So I would like the attorneys to address this
15 question: Whether if granted the remand here considers
16 matters of policy, questions of law, or some -- or some
17 combination of the two.

18 The federal circuit has recognized that if the
19 reason for an agency's request for a remand is a step
20 one Chevron issue, that is an issue as to whether the
21 agency is required by the governing statute to reach a
22 different result than it originally reached, the Court
23 has considerable discretion to either deny remand and to
24 proceed to decide the statutory issue or to order
25 remand.

1 And so to distill it down to its essence, I ask the
2 lawyers is the issue here a pure step one Chevron issue
3 for which no agency deference is justified?

4 Although EPA seeks a remand and stay, it also
5 requests that it be without vacatur of its February 2015
6 decision. In other words, that that decision, or those
7 decisions, will remain in effect during the period of
8 the remand and stay.

9 In opposing the EPA's motion the Penobscot Nation
10 argues that EPA is violating its trust obligations to
11 protect the Penobscot Nation, and it also argues that
12 even if the motion is granted it only relates to Count 1
13 of the second amended complaint and does not remove the
14 need for briefing on Count 2 of Maine's second amended
15 complaint which seeks a declaratory judgment, and that
16 this case needs to go forward for that reason.

17 The Houlton Band of Maliseet Indians argues that EPA
18 has already had the opportunity to review its 2015
19 decisions based upon the stays that this Court has
20 previously granted EPA and that the appointment of new
21 political officials at EPA does not constitute new
22 evidence or intervening event beyond the agency's
23 control to support a remand, and so I would ask the
24 lawyers to address that very point.

25 Absent the 2018 Department of Interior letter, if

1 all we had to go on was the appointment of new officials
2 in the EPA, is that an appropriate basis for the Court
3 to exercise its authority to grant a remand in this
4 case?

5 The Houlton Band of Maliseet Indians also argues
6 that the 2018 letter is not part of the administrative
7 record, and, as I already indicated, I understand the
8 Houlton Band of Maliseet Indians to argue that the 2018
9 letter, in any event, explicitly affirms almost all of
10 the conclusions reached in the 2015 letter which is not
11 consistent with my understanding of the letter, at least
12 at this preliminary stage.

13 Maine supports the remand but opposes the EPA's
14 request that it be without vacatur so as to allow the
15 existing decisions to remain in effect. And it argues
16 that leaving the EPA-created designated use of
17 sustenance fishing in tribal waters in place, while also
18 going through a process to change them, that that will
19 disrupt Maine's management of its waters in this and in
20 related regulatory context such as certifications under
21 Section 401 of the Clean Water Act.

22 Also the State has pointed out that so long as these
23 existing decisions remain in effect they are subject to
24 enforcement through the Clean Water Act citizen suit
25 provisions.

1 Both the Penobscot Nation and the Houlton Band of
2 Maliseet Indians argue that if a stay is granted the
3 Court should deny Maine's request to vacate the
4 February 2015 decisions consistent with EPA's proposal.

5 With respect to the motion by the Penobscot Nation
6 to file a counterclaim, as I understand the State of
7 Maine's argument it is that it opposes the motion on
8 jurisdictional grounds assuming that the Court grants
9 vacatur.

10 And so I understand from the State's filing that
11 absent that situation the State is -- either does not
12 oppose or is agnostic with respect to the motion to
13 amend; although, the State can clarify that today.

14 Those are my preliminary thoughts based upon the
15 written submissions of the party -- parties. It seems
16 to me the EPA gets to be heard first since it is the
17 primary moving party here, and so with that, Attorney
18 Carson, please approach our podium and I will hear from
19 you.

20 MR. CARSON: Thank you, Your Honor. The Court's
21 first question is this differentiation between questions
22 of policy and -- and issues of law for which there might
23 be Chevron one versus Chevron two, and -- and frankly
24 when I use the term policy here I am thinking of areas
25 where EPA has discretion. And, you know, what EPA

1 decided in this case, when it approved Maine's water
2 quality standards, is it approved -- it did two things.
3 It determined that one provision of the Maine
4 Implementing Act itself constituted a designated use,
5 sustenance fishing, for purposes of Maine's water
6 quality standards. And, as the Court is aware, water
7 quality standards consist of designated uses and then
8 criteria to protect those uses.

9 And so it approved this designated use which Maine
10 hotly contests as something that it never submitted to
11 EPA for approval in the first place. Maine views the
12 settlement acts as not constituting part of their water
13 quality standards scheme.

14 EPA also interpreted Maine's fishing designated use
15 to include sustenance fishing for Indian waters based
16 upon EPA's interpretation of the settlement acts.

17 Those two questions, whether any state standard
18 constitutes -- whether any state law that a state has
19 not submitted to EPA for approval or disapproval as a
20 water quality standard actually does indeed constitute a
21 water quality standard is an area for which EPA has
22 discretion.

23 And the question of what the State's standards mean
24 is -- is an area either implicating the State's
25 discretion, or EPA's discretion, or both.

1 Then, after EPA approved those water quality
2 standards, EPA disapproved the State's human health
3 criteria. And, again, criteria exists to protect the
4 standards because it found that they were not
5 sufficiently protective of the sustenance fishing
6 designated uses that EPA approved. That's another area
7 for which EPA has substantial discretion.

8 Those are not areas of Chevron one or -- those are
9 areas where it is really EPA, in the first instance,
10 exercising legal discretion under the Clean Water Act
11 and EPA's regulations and EPA's policy guidance, and in
12 the second instance with return -- with respect to the
13 human health criteria it really comes down to scientific
14 judgment calls.

15 What EPA has determined to do in this case is --
16 and, first of all, I would like to back up just one
17 second before I get into this because, as we pointed out
18 in our reply memorandum, what EPA would like to do, if
19 the Court grants voluntary remand, is EPA would like an
20 opportunity to come up with a proposed decision -- a
21 proposed set of decisions I should say. It would like
22 four months to -- to develop that document that will
23 fully explain its reasoning for its changes. It would
24 like to provide an opportunity for public comment,
25 including of course comment by Maine and the tribes who

1 have intervened here, and would like, you know, time to
2 consider those comments and come up with a final
3 decision that will take the comments into account, take
4 the 2018 Department of the Interior clarification letter
5 into account, and of course allow the parties to give
6 their view of what that letter means.

7 And so what EPA would do in the first instance is
8 come up with a proposed set of decisions. That -- those
9 proposed set of decisions it is fair to say will be
10 materially different than the decisions that are
11 challenged here. And it will be materially different,
12 as I understand it, with respect to EPA's interpretation
13 of Maine's water quality standards to include a
14 designated use of sustenance fishing and this question
15 of whether the settlement acts themselves constitute a
16 -- a -- a sustenance fishing designated use as a water
17 quality standard under Maine law.

18 And, again, those are areas that are clearly within
19 EPA's discretion. So I would consider them more -- in
20 that respect more of a policy call -- you know, policy
21 in the small P meaning areas where EPA has discretion --
22 than simply an area where, you know, one could say that
23 it is just a strict matter of law.

24 I am not sure whether EPA even intends to delve into
25 the question of what the settlement act means in terms

1 of the tribes fishing rights. I -- I don't know. It
2 strikes me that it could or couldn't speak to that.

3 But clearly, regardless of whether the settlement
4 acts establish a fishing right, that doesn't necessarily
5 mean that it establishes a designated use under the
6 Clean Water Act of sustenance fishing. That's the area
7 that EPA intends to look at. So -- so it really is
8 something different than just looking at what do the
9 settlement acts provide vis-a-vis the tribes fishing
10 rights.

11 So these are areas, again, that EPA has discretion,
12 EPA is determined to exercise its discretion differently
13 here, and that's the reason that EPA is seeking a
14 voluntary remand so it can do that.

15 THE COURT: So I want to interject to make sure
16 I understand your point. So are you suggesting then
17 that the -- the 2018 Department of Interior letter
18 really says nothing then about this question of whether
19 EPA should treat sustenance fishing as a designated use?

20 MR. CARSON: Well, you know, the interesting
21 thing with what I can say about the Department of
22 Interior's clarification letter is that, you know, I am
23 here today I am not really defending any decision. EPA
24 has decided that it is not going to defend the decisions
25 that are challenged here and it intends to change those

1 decisions.

2 So far EPA has not had the opportunity to -- to come
3 up with a new decision that examines the 2018 letter,
4 and so I am not sure what EPA's view of that letter is
5 going to be going forward. It clearly contains some
6 clarifications that I suspect EPA will want to take into
7 account. EPA has indicated it intends to take into
8 account on remand.

9 It does clarify -- and -- and it -- and I don't know
10 exactly how EPA is going to view it, but it does clarify
11 the Department of the Interior's opinion with respect to
12 the fishing rights and also the Department of the
13 Interior opined on a study that EPA used when it was
14 examining the State's human health criteria. So EPA
15 does want the opportunity to take that into account on
16 remand, it is an intervening event. And the only way
17 EPA can really take it into account at this point, you
18 know, is for there to be a remand so that it could do
19 that.

20 But I -- I am really not here today to tell you
21 exactly how that letter will result in any change in
22 EPA's opinion because frankly I haven't had the benefit
23 of EPA's analysis of that letter yet. But I think it is
24 an important event. I -- I just don't know, again,
25 exactly what EPA is going to do on remand or wishes to

1 do on remand with respect to the question of the tribes
2 fishing rights.

3 THE COURT: Do you agree that the Department of
4 Interior's opinion letter really strictly addresses
5 questions of law and not questions of policy?

6 MR. CARSON: You know, again, I haven't really
7 -- I haven't had the benefit of seeing EPA's view of it.
8 I think the question of what the settlement acts provide
9 in terms of fishing rights for the tribes is probably a
10 question of law. But, again, you know, the questions
11 that EPA is concerned with here really goes to what
12 those statutes mean in terms of water quality standards,
13 and that's really the -- kind of the nub for EPA.

14 And -- and I -- you know, again it strikes me that
15 it -- even if, for instance, you know, the Penobscot
16 Nation wants to establish that it has a right under the
17 Maine Implementing Act to sustenance fish in its inland
18 reservation waters is my understanding, and the
19 Department of the Interior has opined upon that, and I
20 think EPA's view is that even if that's the case -- and
21 I -- and -- and by saying even if that's case I am not
22 here today to take a position one way or the other. I
23 know the Department of the Interior has spoken to it;
24 but, again, I am not here to defend the position because
25 I don't have one that EPA wishes to defend, and it

1 hasn't made a new decision yet. So I say even if solely
2 with that clarification. But that doesn't necessarily
3 mean it is a water quality standard.

4 And, of course, EPA implements the Clean Water Act.
5 I mean it is -- it is -- it -- you know, I think one of
6 the things that -- that EPA wants to do here is to kind
7 of base its decisions more under its Clean Water Act
8 authority and less -- using the settlement acts in -- in
9 a much less way here.

10 But, again, none of us yet have the benefit of EPA's
11 proposed decisions, and, you know, EPA will lay all that
12 out; but --

13 THE COURT: The case is a little bit unusual in
14 the sense that I have already given -- granted EPA an
15 extended period of time to reconsider its position, so
16 this is effectively the second request. Second request
17 considered, globally I think it might be the third. I
18 think there were two requested stays in connection with
19 what I am referring to as the first stay in this case.

20 MR. CARSON: Mm-hmm.

21 THE COURT: Why should I conclude that although
22 the agency has discretion, as you -- as -- as I think
23 everyone acknowledges, to reconsider its decisions, why
24 should I conclude that that discretion is not abused
25 when an agency is given the opportunity to reconsider

1 its position at length after the change of a
2 presidential administration, announces well actually
3 we're not changing our position, we're sticking with it,
4 the case goes forward, the record is developed, the --
5 in this case the State, the plaintiff, presents its
6 brief on the merits, a matter of some weight given the
7 complexity of the case and the amount of effort that's
8 been involved, and judicial resources, why should I
9 conclude that it is not essentially an abuse of
10 discretion for the agency to ask now again that the case
11 be put on hold while it thinks more about it?

12 MR. CARSON: Yeah. Well, I can tell you I am --
13 I am painfully aware personally of the -- of the
14 somewhat inefficiency that was involved in having that
15 stay before and now having EPA determine that it wishes
16 to change its decisions. But I guess I will say that,
17 you know, the Supreme Court has said that agencies have
18 the discretion to change their discretionary decisions
19 on a continuing basis, and, you know, frankly that's --
20 EPA's thinking has evolved here.

21 We do have the new DOI clarification letter that it
22 wishes to take into account, and, you know, Your Honor,
23 we still have about 290 pages of briefing left in this
24 case by my count.

25 So if we think about it in terms of what's efficient

1 to do here, it is much more efficient to allow EPA to
2 change these decisions, given that it has discretion to
3 do so, than it is to go forward.

4 And, frankly, even if we got -- I mean, you know, if
5 you look at a case like Brand X, for instance, where the
6 Supreme Court has basically said that even after a court
7 has interpreted a statute that an agency administers, on
8 a question of Chevron two an agency can still determine
9 that the statute should be interpreted differently.

10 So I think that's just an indication that, you know,
11 Supreme Court views it -- views agency discretion to
12 change their mind to continue throughout time.

13 And even if we litigated the merits here -- and
14 frankly, as we pointed out in our reply, I mean I am not
15 even sure what we would say on the merits. I think EPA
16 would be in the position of -- of trying to change its
17 decision in the context of -- of a brief on the merits
18 of decisions that it -- it doesn't intend to defend, so
19 it would be -- it would be a bit of a mess frankly.

20 So even if we do that, though, I mean even if we
21 defended the merits and got down the road, on these
22 areas in which EPA has discretion EPA could still change
23 its mind after this Court decides the questions.

24 So, you know, I think you have to look at this
25 question of abuse of discretion in the context of -- of

1 how the Supreme Court has allowed agencies leeway to
2 allow their policies to evolve over time. And that's
3 simply all that's happened here is, you know, yes, EPA
4 looked at it before, but we do have different EPA
5 leaders in place. Frankly, I think even if we didn't
6 have new senior EPA leaders in place the agency would
7 still be entitled to change its mind, and it should
8 still be able to get a remand in order to do it.

9 But the fact that we do have new EPA leaders in
10 place -- I mean we mentioned that in our brief primarily
11 to show the Court that we're aware that there was a
12 period of time in 2017 where the agency looked at that,
13 and there are fresh eyes that have looked at the
14 question, and we do have the 2018 opinion letter from
15 DOI that EPA wants to take into account.

16 Now, again I can't tell you how it is going to take
17 it into account because no one at EPA has -- has
18 informed me entirely of its view of that letter, so I am
19 not able to speak to that; but -- but it is an
20 intervening event that I think is important for this
21 case and that the agency wants to take into account.

22 So, you know, I guess I would say that the -- the
23 fact that there was a period of reconsideration last
24 year is -- it is certainly unfortunate, there are some
25 inefficiencies associated with that; but it shouldn't be

1 a basis alone to deny remand when the court -- Supreme
2 Court has recognized that agencies have this ability to
3 allow their thinking to evolve over time and to change
4 their decisions on a continuous basis.

5 And so, you know, we kind of -- not to be callous
6 about it because, again, if -- if anybody understands
7 the efficiencies it is yours truly. I have done a ton
8 of work in this case and -- you know, but we are where
9 we are, and EPA has decided to change those decisions.

10 And, again, given that fact, I think we just have to
11 recognize that -- that it would be incredibly
12 inefficient to go forward on the decisions that we have
13 now because EPA does not intend to defend those. It
14 would be a bit chaotic in the briefing. There is still
15 a lot of briefing left. By my count there is like
16 290 pages.

17 And, you know, we pointed out in the reply I mean
18 there are certainly cases like the Southwestern Bell
19 case in the DC circuit where the Court granted a remand
20 after a petitioner had filed its brief and the Court
21 then upheld the agency's decision on remand.

22 And so, you know, I -- I do think to some extent
23 that Maine's brief also crystallized the issues for the
24 agency here. And, you know, again I think the process
25 that EPA has -- has put forth when you -- when you think

1 about the question of do we go forward now and have
2 this -- you know, this chaotic situation where EPA
3 intends to change its decisions and not defend them, I
4 am not -- again I am not sure what we would say in our
5 -- in any brief we would file, and frankly I would want
6 a lot of time to -- to work with the agency to figure
7 out what we're going to do.

8 And then you have got a situation where, as EPA
9 proposes, to have a proposed decision on a remand, to
10 allow public comment, allow comment from the parties,
11 fully articulate the basis of its change, and then
12 have -- you know, everyone have the ability to comment
13 on what the DOI letter means. That's going to provide a
14 much better footing for judicial review going forward.
15 And, you know, I -- I just think in light of where we
16 are that really makes sense here in this case in terms
17 of the posture of where we are now.

18 THE COURT: So you suggest that there is need
19 for the agency to receive public comment on what the DOI
20 letter means?

21 MR. CARSON: Well, EPA is going to provide an
22 opportunity for that. I think what EPA would like to do
23 is EPA would like to issue a proposed decision, and I
24 think -- you know, they haven't drafted it yet
25 obviously, but -- but I would think that they would --

1 they would set forth their view of -- of what it means
2 to the extent that they think it is necessary to do so
3 in exercising their -- its discretion going forward in
4 this new set of decisions. And then it will provide the
5 public and the parties an opportunity to comment on --
6 on the entirety of its proposed decision including any
7 -- you know, any opinion that it -- it -- that it issues
8 with respect to the DOI opinion.

9 And so, again, I think that's just -- it -- it will
10 provide a much better footing for judicial review if we
11 allow that process to go forward because -- you know, I
12 mean it is clear -- again, I am not able to speak to
13 what the DO -- the 2018 letter means because that's
14 really EPA's role and not mine as the litigator
15 defending decisions, but I do believe it is clear that
16 the State of Maine has a diametrically opposed opinion
17 of what it means as opposed to what the tribes think it
18 means.

19 THE COURT: Okay.

20 MR. CARSON: And so I -- I think providing that
21 opportunity will be important going forward and will put
22 us all frankly -- again, you know, I -- on behalf of the
23 agency, I apologize for the delay and -- that occurred
24 last year; but, again, given that the agency does have
25 the discretion to do this, and given that they have

1 decided to exercise that discretion, you know, I think
2 perhaps the better way to look at it is what's -- what's
3 the best path forward, and I think what EPA has proposed
4 is really the best path forward.

5 THE COURT: Thank you, Mr. Carson.

6 MR. CARSON: Yes.

7 THE COURT: Attorney Boak.

8 MR. BOAK: I want to get right to some of your
9 questions, Your Honor. The two questions you raised
10 that flow from the DOI opinion, the State believes those
11 are flat questions of law that EPA should receive no
12 deference for. The State does believe there is some
13 discretion for an agency like EPA to revisit its
14 decision within those parameters where it is within
15 their -- their jurisdiction to do so with respect to
16 water quality standards; but those are actually
17 questions of interpretation of the settlement acts, and
18 the State believes they are unambiguous and EPA would
19 get no discretion.

20 THE COURT: Attorney Boak, if that's the case
21 then is it fair to say that if I grant the remand it is
22 -- it is not based on the DOI letter, it is based upon
23 the leaders of the agency exercising their judgment that
24 as a matter good policy they need to look again at this
25 issue under the Clean Water Act and reach a fresh

1 decision, that that really is the basis for the remand?

2 MR. BOAK: Yes. I think that it is -- that they
3 would be relooking at those issues, and I think that
4 they do have the ability to take a different
5 interpretation of law. Whether or not that is -- is --
6 you know, it is a question of law, and whether they
7 deserve deference is a different question; but I think
8 that -- and I think there is support for this notion
9 that they -- that EPA has the ability to go in a
10 different direction both with matters of policy but
11 interpretations of law.

12 The State is looking at this from a practical
13 standpoint. We've already filed our brief. Our
14 position is out there. And what the State doesn't want
15 to see happen is EPA take a new action while litigation
16 is going on in this context and have to spin out a whole
17 separate round of litigation and go through this process
18 again.

19 So the State is looking at it from the more
20 pragmatic standpoint where we're in a bit of a bind
21 where EPA is not indicating how they are going to go
22 with respect to some of these central issues as the
23 Penobscot Nation calls the designated uses, but there is
24 -- they are claiming they are going to do it.

25 And the State believes that if -- if EPA issues a --

1 a new action on designated uses it is going to supplant
2 and likely moot the ones that are currently being
3 challenged by the State.

4 So we're left trying to figure out the best way
5 forward that's going to maintain the status quo and
6 avoid disruptive consequences for all the parties, and
7 so that's -- that's been the guiding principle for what
8 the State has been trying to do to navigate where we
9 found ourselves procedurally.

10 THE COURT: How does that then square with your
11 position that I should vacate the existing decisions
12 while this -- while the case goes back?

13 MR. BOAK: The decisions that the State is most
14 concerned about at this point are the designated use
15 decisions. Decisions one and -- and two of the three
16 that EPA is looking to reconsider.

17 The existence of the Maine rule really provides
18 cover for all the parties with respect to that third
19 decision of the ultimate disapproval. The State thinks
20 we can vacate that decision as well, but there has been
21 some argument in the briefs about well what if that
22 resulted in, you know, in a couple weeks from now a
23 challenge to the Maine rule.

24 It is really those designated use decisions that EPA
25 has just said that they are not going to defend on the

1 merits at all going forward, and they don't know what
2 they would say about them, but they would have ongoing
3 and continuing effect in Maine in different
4 consequences, and so that would be a problem for the
5 regulatory structure and the regulating community. It
6 raises all kinds of questions: Are they in effect?
7 What do they mean these designated uses? How were they
8 attained? What will happen if -- if the State of Maine
9 and the applicants try to take an interpretation and a
10 new EPA action on those designated uses comes out and it
11 is different? It would be guesswork that would not
12 serve the regulated community or anybody well.

13 And so that's essentially the argument for vacatur,
14 trying to maintain that status quo that would protect
15 the State's regulated community while still
16 acknowledging that in place we have this criteria that
17 has not yet been challenged that will protect interests
18 of the tribes and -- and the environment.

19 THE COURT: Thank you.

20 MR. BOAK: I want to get to some of your other
21 questions. Your Honor said essentially we're agnostic
22 on the motion to amend. I think that's right. It is a
23 matter of timing depending upon which way the Court
24 goes. If this action continues on, I think that's
25 right, the State is agnostic. It is essentially the

1 mirror image or the inverse of the declaratory relief
2 that the State is asking for.

3 But if there is any remand, the State thinks that it
4 is -- really we need to see what EPA is going to do
5 first because of the likely mooted effect that
6 decisions would have, and so -- especially if there is
7 vacatur and these decisions get taken out of play, then
8 the State also believes there is no jurisdiction as
9 well.

10 The tribe -- the Penobscot Nation argued that there
11 still is a right dispute with the State, and the State
12 just disagrees that it is necessarily tied up with a --
13 a live pending controversy over an existing EPA action.
14 Really that's -- through EPA interpretation and
15 approval, that's where water quality standards for
16 purposes of Clean Water Act that's where the rubber hits
17 the road, and so only in that context would there be a
18 live controversy.

19 THE COURT: Thank you.

20 MR. BOAK: I want to answer any other questions
21 that the -- the Court has with respect to the State's --
22 the State's position.

23 THE COURT: You have answered my questions.
24 Thank you.

25 MR. BOAK: Okay.

1 THE COURT: Attorney Smith.

2 MR. SMITH: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. SMITH: So, Your Honor addressed at the
5 get-go the question of whether if we took the Department
6 of the Interior opinion out of the equation and we
7 looked at this as simply a change spurred by personnel
8 changes, whether that would be something that the Court
9 would not allow.

10 In fact, the Department of the Interior opinion may
11 be taken out of the equation because the Department of
12 the Interior opinion is basically consistent -- the new
13 opinion is consistent with the first position. So
14 nothing has really changed on the ground in terms of
15 what the interior department has said here. I will get
16 into the details of that in a minute.

17 And what really is going on here, when you
18 crystallize it down, is that there has been a change in
19 personnel at EPA that, in fact, did not wake up to the
20 full-throated defense of the Obama administration's
21 determination to protect the fishing rights of
22 indigenous people in Maine until days before this
23 full-throated merits brief was to be filed with this
24 court.

25 And Your Honor recounted the procedural history and

1 then skipped from I think it was May to July. There was
2 a very important moment in this case which explains
3 really why EPA has asked for this remand now, and I
4 think it is very important for the Court to see what
5 happened between the 21st of June and the 26th of June.

6 EPA's merits brief was due on the 21st of June.
7 Just days before it was due, EPA's counsel filed a
8 motion for a one-week extension of time representing to
9 the Court that it had been working diligently to prepare
10 its brief to be filed on the 21st, but it said, quote,
11 however EPA's internal review of its draft merits brief
12 has coincided with other pressing matters requiring the
13 attention of senior EPA reviewers. So it was all set to
14 go, it just needed some senior EPA reviewers to check
15 out the brief. So we agreed to that, that was fine; and
16 the Court granted the extension for one week.

17 Well, then within days the EPA came back on the
18 26th, just five days later, and filed this joint motion
19 to amend the scheduling order to extend all deadlines
20 for 30 days for the purpose of EPA and Maine to have
21 settlement discussions, and we were informed that the --
22 the tribes would not have a seat at that table.

23 So at this moment, on the -- on the brink of filing
24 their merits brief, when according to the papers before
25 this Court the only thing left to do was for senior EPA

1 officials to review the brief, they pulled back, they
2 balk.

3 And I think the implication all over this is that
4 when this merits brief went up the food chain at EPA and
5 senior officials -- even though Scott Pruitt had been
6 the administrator throughout this whole process for
7 years and thoroughly reconsidered and decided not to
8 grant Maine and the dischargers petitions, they caught
9 wind of a brief that they didn't like and they pulled
10 back. So it is -- it has a political motivation all
11 over it, Your Honor. And when there is a political --
12 politically motivated change in agency position, that's
13 an abuse of discretion.

14 And I would just refer you to this article. I know
15 that this is by a Yale law student, but it is the only
16 article that's ever been written in 20 years on
17 voluntary remand, and it is written by a very bright law
18 student Joshua Rivas (phonetically). And his position,
19 that is well supported, is that when you have a
20 situation where a voluntary remand is requested for
21 policy reasons, then you have -- you should invoke the
22 Supreme Court's standard in Motor Vehicles Manufacturers
23 versus State Farm and take a hard look at whether there
24 is policy justifications for the change. And if that
25 hard look reveals that actually what's going on is a

1 politically driven change at the administration, then --
2 then that's wrongful. That's arbitrary and capricious
3 and should not be allowed.

4 Because at the end of the day judicial economy is
5 going to be completely sacrificed in a situation like
6 this. At the end of the day we're going to have an
7 agency that's flip-flopping all over the place. When an
8 agency flip-flops, we know darn well that Chevron
9 deference starts to diminish quite quickly because it
10 has gone back and forth, and the more that it looks
11 politically motivated the worse it is.

12 So we're going to have this -- if the Court remands,
13 what's going to happen is this whole thing is going to
14 go back to the agency, we're going to have another --
15 God only knows how long it is going to take for the
16 agency because there will have to be comments, there is
17 going to have to be consultations with the tribes, and
18 we're going to have another decision, and we're going to
19 be back before you in probably two years. And in the
20 meantime we've already been before this Court since
21 2015.

22 So what's -- what is portended here is something in
23 terms of its consequences for judicial -- judicial
24 economy very consequential and adverse.

25 And as a practical matter remand can be denied, EPA

1 does not have to file a brief. There is authority, good
2 authority, for the proposition that if an agency has
3 been in a case defending an agency position and then it
4 decides to abandon that position, and intervenors have
5 come in in the meantime to defend that position, the
6 case can go forward, and that can simply happen here.
7 So for those reasons, Your Honor, remand should be
8 denied in this case.

9 I would like to just shift, if I may, to the -- the
10 Department of Interior's opinion because Your Honor said
11 that you thought that the DOI's opinion may be the
12 grounds for the shift here on the agency's part. And of
13 course that would not obviously be politically
14 motivated, it would be sort of a warranted basis, if you
15 will, for the shift. But DOI's opinion is just can't --
16 if you look at it, it can't really be part of the
17 equation.

18 Let me take the sustenance fishing definition first.
19 We have not been arguing in this case, or at any time,
20 the issue of whether sustenance includes a commercial
21 fishing aspect. That's just not part of the case.
22 Never has been.

23 So if you look at Interior's opinion in January of
24 2015 at page four, which is at ECF 141-10 page ID 3851,
25 Interior goes to great lengths to describe what is meant

1 by sustenance in the settlement acts, and construes
2 sustenance in accordance with the canons of federal
3 Indian law requiring that it be liberally construed, and
4 determines that it is at least the right of tribal
5 members to take sufficient fish to nourish and sustain
6 themselves.

7 Well, that's -- that's all we've ever argued in this
8 case. The April 2018 opinion says nothing to the
9 contrary. It has this gratuitous statement about
10 commercial not being part of sustenance, but we could
11 care less about that. It just -- it is a non --
12 nonissue.

13 I am going to defer to Attorney Albright with
14 respect to the effect of the April 2018 DOI opinion on
15 sustenance and fishing generally for the -- the trust
16 lands; but as -- as you said at the outset, Your Honor,
17 it is the opinion -- and Mr. Albright will go into this
18 -- the opinion is very vague with respect to what's --
19 what the fishing use and right is on the trust lands and
20 -- and really does not materially retract from what DOI
21 said in January of 2015. So the DOI opinion should be
22 out of the equation.

23 When you look at the realities of the case, Your
24 Honor, this is a personnel shift, politically motivated,
25 and remand should be denied, and we can proceed to the

1 merits. We're prepared to brief them ourselves. EPA
2 can choose to -- to chime in as it sees fit. But we
3 should waste no more time and get down to it.

4 If you have no questions for me on the remand issue,
5 Your Honor, I will go to the counterclaim.

6 THE COURT: How about the -- I would like you to
7 address the other aspect of the DOI letter, the
8 conclusion. It appears that the DO -- that DOI did not
9 regard the northern tribes to have federally protected
10 fishing rights. Could you comment on that, please?

11 MR. SMITH: The northern tribes being the
12 Houlton Band of Maliseet Indians who are not -- is not
13 my client, Your Honor, and --

14 THE COURT: And the Aroostook Band of Micmacs.
15 Yeah, I realize these are not your clients, but
16 nonetheless I am interested to understand your client's
17 understanding as to whether the Court should regard that
18 as being a significant question of law that does in fact
19 call into question EPA's earlier decisions and should
20 give it the opportunity to reconsider its decisions.

21 MR. SMITH: Thank you, Your Honor. I --
22 actually, that part of the opinion does affect the
23 Penobscot's fishing rights on their trust lands, we
24 should be clear about that. So there is two aspects of
25 the Penobscot Nation's fishing rights. There is the on

1 reservation within the reservation waters of the
2 Penobscots, which is an expressly designated sustenance
3 fishing right under 62074 of the Maine Implementing Act,
4 but the tribe also has rights to fish for sustenance in
5 its trust lands which are equivalent to what Houlton
6 Band of Maliseet Indians and Aroostooks have, so there
7 is that overlap.

8 So I will just read directly from Interior's April
9 of 2015 -- 2018 decision. It says -- with respect to
10 the northern tribes -- and while we affirm the
11 proposition contained in the 2015 letter that express
12 language in a treaty is not necessary to establish the
13 existence of a tribal fishing right, we note that such
14 rights only arise from statute or a federal set aside
15 and supervision of lands that include bodies of water
16 inhabited by fish for the retention of aboriginal
17 rights.

18 Well, when the United States takes land into trust
19 for a federally recognized Indian tribe, it sets aside
20 land and federal supervision over those lands. The DOI
21 opinion of April didn't add that sentence, but that's a
22 fact.

23 Despite concerns about whether the northern tribes
24 retain their fishing rights, we continue to recognize
25 the centrality of sustenance fishing to the culture of

1 the northern tribes. Well, that's a restatement of what
2 DOI said in its January of 2015 opinion. It is all over
3 this case.

4 The cultural -- and I guess we should just stand
5 back for a minute here in 2018. We're dealing with an
6 aboriginal population for whom sustenance fishing is
7 absolutely central to their identity, you know, and this
8 goes a long ways back.

9 So it is easy for us to stand here today and talk
10 about this in sort of these abstract legal terms, but at
11 -- but Congress promised these tribes that their
12 cultural ways would be preserved, that they could
13 practice them, and sustenance fishing for these tribes,
14 as is borne out by the record before you, is absolutely
15 at the heart of the identity of these tribes. I -- I
16 just think it is important for us to -- to be humble
17 enough to recognize that fact.

18 So in the end, Your Honor, I don't think Interior's
19 opinion really does change -- the new opinion doesn't
20 change the old opinion in any material way. And, again,
21 I would defer to Mr. Albright to put more meat on the
22 bones of that.

23 In terms of our counterclaim, the -- all we are
24 asking the Court to do is to move forward on the central
25 issue which is a purely legal issue of whether pursuant

1 to principles of federal Indian law embodied in the
2 Maine Implementing Act, and Congress's ratification of
3 the Maine Implementing Act, the sustenance fishing right
4 of the Penobscot Nation requires that when Maine
5 promulgates water quality standards within this
6 sustenance reservation fishery it must do so to ensure
7 that there are sufficient fish for the tribe to
8 meaningfully eat and be nourished by.

9 We cited to you the recent case from the Ninth
10 Circuit en banc, United States versus Washington, in
11 which Judge Willie Fletcher issued a comprehensive
12 decision setting forth the federal Indian law grounds
13 for why a treaty right to fish includes with it the
14 right to a habitat that the fish exist and you can eat
15 them. It is fundamental. And it is a fundamental
16 controversy between the State of Maine and the Penobscot
17 Nation that is before you now, and needs to be resolved,
18 and will in fact inform EPA if the Court were to remand.
19 We don't think the Court should remand. But we should
20 go forward on that central controversy because it
21 informs fundamentally what EPA's task is about here.

22 Now, we have learned today -- and we learned at the
23 end of June in the surprising situation where a merits
24 brief was on the brink of being filed and then pulled
25 back -- that EPA wants to somehow divorce the tribes

1 Clean Water Act rights and opportunities from the very
2 nature of their fishing rights as aboriginal sustenance
3 fishing rights a la the United States versus Washington
4 case requiring water quality.

5 It is fundamental to Penobscot Nation that the
6 Interior opinions supporting its position with respect
7 to its on reservation sustenance fishing right that
8 anything that happened with respect to how that fishing
9 right integrates with Clean Water Act authorities
10 operate in full.

11 I am not sure that sentence came out as well as I
12 would like it; but the point is that we need to know if
13 Interior is correct, and the Penobscot Nation fully
14 supports Interior's position, or whether the State of
15 Maine is correct. Because the State of Maine takes the
16 position that the Penobscot Nation has no special rights
17 to any water quality to support a fish population that
18 -- that the tribal members can eat. The State's
19 position is that all that that right entails is the mere
20 opportunity to dip a net into the waters in hopes of
21 catching -- catching whatever fish are available. That
22 is a controversy that is alive, it is before the Court.
23 We have it -- a cause of action under Federal Indian
24 Common Law to address it. I would refer you to National
25 Farmers Union versus Crow Tribe for that proposition.

1 And I want to give you another cite. Recent Tenth
2 Circuit decisions Ute Indian Tribe versus Lawre, which
3 is 875 F.3d at 539, established that the Ute tribe can
4 bring an action against a state court judge and
5 plaintiff for a determination under Federal Indian
6 Common Law as to whether the state has authority to
7 adjudicate a claim.

8 I would submit that the State's DJ action is very
9 much like that where the State is requesting a
10 declaratory judgment as to what are its constraints or
11 opportunities in lieu of the settlement act requirements
12 when it promulgates water quality standards in Penobscot
13 waters. These are -- are claims that arise under
14 Federal Indian Common Law, Your Honor.

15 So the other case is Navajo Nation versus Dalley
16 which is 896 F.3d 1196. And, as I said, those stem from
17 National Farmers Union versus Crow Tribe which is 471
18 U.S. 845.

19 THE COURT: Attorney Smith, let me -- let me
20 interject. I want to make sure I am following you. You
21 are not suggesting, though, that it would be desirable
22 or even feasible for the two counts of the State's
23 complaint to be separate and -- separated therefore the
24 Court to grant the remand with respect to Count 1 -- to
25 grant the remand that EPA requests with respect to the

1 Count 1 claims but to deny the remand with respect to
2 and deny a stay with respect to Count 2 and have the
3 litigation proceed here and not have this Court go ahead
4 and decide it. You are not suggesting that, are you?

5 MR. SMITH: I am.

6 THE COURT: You are suggesting that.

7 MR. SMITH: I don't see any reason why the Court
8 should not do that if it were to grant remand.

9 THE COURT: Doesn't that set up a situation
10 where depending upon which -- which result is achieved
11 first, EPA makes its final decision -- its final rule
12 making or this Court issues its judgment, it sets up a
13 situation where there could potentially be a conflict
14 and therefore generate even more litigation?

15 MR. SMITH: Not necessarily at all. EPA is
16 going to take its time to do what it thinks it needs to
17 do. It has Interior's opinions before it. A decision
18 by this Court about -- we're not -- in Counts -- in
19 Maine's Count 2 in our counterclaim we're not asking you
20 to apply the Clean Water Act. Not anything that's in
21 the discretion of the EPA. We're asking the Court to
22 address what's required by the Maine Indian Claims
23 Settlement Act which is actually in the discretion of
24 the Department of the Interior under Passamaquoddy Tribe
25 versus State of Maine where the First Circuit said that

1 the Department of Interior is the agency with deference
2 to administer the Maine Indian Claims Settlement Act, so
3 -- and it is -- it is strictly to determine what are the
4 requirements when Maine promulgates water quality
5 standards. Does Maine have to account for the -- the
6 necessity that there be clean waters to support fish
7 pursuant to the Maine Indian Claims Settlement Act when
8 it addresses environmental regulations in Penobscot
9 sustenance fishery. Period.

10 That doesn't require you to opine about how that is
11 then to integrate with the Clean Water Act, it is a pure
12 question of law related to the Maine Indian Claims
13 Settlement Act, and that is in controversy. And your
14 resolution of it, depending upon what you say, but if
15 you affirm Interior's position on those points, if you
16 go the route that the Ninth Circuit went, then we will
17 have good guidance in a -- from a federal court upon
18 which EPA can then act beyond what Interior already
19 says.

20 THE COURT: Thank you. Attorney Albright.

21 MR. ALBRIGHT: Thank you, Your Honor. May it
22 please the Court, Cory Albright on behalf of the Houlton
23 Band of Maliseet Indians. I would like to briefly
24 introduce the chief of the Houlton Band, Clarissa
25 Sabattis, as well as the Houlton Band's environmental

1 planner Ms. Sherri Venmo.

2 Your Honor, the Houlton Band is a riverine tribe whose
3 homelands and land base is on the Meduxnekeag River. It
4 is up in the northeast corner of the state where they
5 have been fishing and hunting for thousands of years.
6 The water quality of the Meduxnekeag, and the health of
7 the fish in those waters, is critical to their culture,
8 to their diet, to their entire way of life. Right now
9 the fish are too polluted to eat. That's why the
10 Houlton Band is fighting to protect those waters, and
11 has been for the past 25 years, and it's why we're here
12 this morning.

13 I would like to address the issues that you raised,
14 Your Honor, this morning in your good summary of where
15 we are to date. First of all, I would like to briefly
16 note that EPA has not indicated actually whether or how
17 it will change its decisions in this case. In its reply
18 brief at page three it says that it, quote, might revise
19 the decisions, and at page 11 it says that at a minimum
20 it will reexamine the decisions.

21 As you know, EPA has not confessed any legal error,
22 and they have insisted that the decisions are lawful and
23 valid, and the Houlton Band agrees.

24 Your Honor, one of the important issues that's come
25 up this morning in the context of voluntary remand is

1 the April 2018 letter from Interior. And I would like
2 to explain why that does not constitute a significant
3 intervening event for purposes of remand.

4 Where I would like to start with that, however, for
5 the con -- purposes of context is EPA's 2015 decisions.
6 The decision itself is relatively straightforward.
7 Maine's human health criteria in Indian waters were not
8 strong enough to protect an existing use of sustenance
9 fishing in Indian waters and they were disapproved.
10 There is no dispute that Maine tribes engage in
11 sustenance fishing and that those were purposes for
12 which the Houlton Band's lands were set aside.

13 So EPA's 2015 decision as to an existing use of
14 sustenance fishing on Houlton Band trust lands it turned
15 on the purpose and use of those lands. It did not turn
16 on a finding by EPA that the Houlton Band has, quote,
17 federally protected fishing rights.

18 Now, the Houlton Band firmly believes that they do,
19 in fact, have federally protected fishing rights under
20 federal law. But what EPA said in its 2015 decision,
21 and this is in the docket at Docket 154-6, quote, EPA is
22 not concluding that there is -- is an aboriginal fishing
23 right reserved to the northern tribes on their trust
24 lands, but the agency does conclude that there is
25 sufficient evidence in the legislative record to

1 indicate that Congress intended the northern tribes to
2 engage in sustenance practices on their trust lands.
3 The agency will interpret the designated fishing use to
4 include the ability of tribal members to safely take
5 fish for their individual sustenance.

6 The 2018 Interior letter is completely consistent
7 with EPA's 2015 rationale. There is nothing in the 2018
8 letter that is contradictory with EPA's finding in its
9 decisions in this case.

10 So while the Houlton Band -- as we indicated in our
11 brief, there are many things about the April 2018 letter
12 that simply affirm what Interior said in 2015; but Your
13 Honor raised a question as to whether or not we believe
14 Interior made any changes, and that -- that was not the
15 intent of our brief.

16 What Interior did do in 2018 was, as Mr. Smith
17 indicated, continued to recognize the centrality of
18 sustenance fishing to the Houlton Band, it affirmed the
19 federally protected rights of the southern tribes, and
20 then it said we cannot with similar clarity identify
21 such rights for the northern tribes.

22 Now, in 2015 the solicitor had written a very
23 lengthy opinion, which is in the docket in this case at
24 22-4 document, which lays out why the northern tribes
25 also have federally protected rights; but for purposes

1 of the remand, Your Honor, that's neither here nor there
2 because the remand is about whether or not EPA's
3 reviewing its 2015 decision.

4 That 2015 decision, as I just indicated, did not
5 turn on whether or not the northern tribes have
6 federally protected rights. Rather it turned on the
7 purpose and use of their -- their let -- those lands.
8 That is something that Interior reaffirmed in 2018 and
9 did not say anything that would suggest a different
10 outcome might be warranted by EPA.

11 The other -- there are several other reasons, Your
12 Honor, why a remand is not warranted. As you indicated,
13 as a practical matter EPA has already had one voluntary
14 remand in this case, and that came in the form of two
15 consecutive stays, and it was for the current
16 administration to review the decisions.

17 The Houlton Band takes the reasons offered by EPA at
18 face value, but those reasons they simply don't report
19 -- support a voluntary remand. The agency does not have
20 unlimited discretion to change decisions or to rereview
21 decisions that have been made and that have been
22 reaffirmed.

23 These are the exact same issues the EPA indicated in
24 2017 that it would like to reconsider, and what EPA said
25 then was, quote, if EPA determines not to reconsider the

1 challenged decisions in light of the administrative
2 petitions, then the briefing can resume and the parties
3 can brief the issue confident that EPA will not withdraw
4 their decisions. EPA then in December affirmed the
5 decisions.

6 A remand here would substantially prejudice the
7 Houlton Band, Your Honor. A key issue in this case, and
8 the key issue that is not going to go away, is whether
9 EPA and Maine must recognize tribal sustenance fishing
10 as a use to be protected under the Clean Water Act.

11 The Houlton Band is a very small tribe with very
12 limited resources. It has already commented on the
13 original approval and disapprovals in 2015, the
14 promulgation of federal water quality standards in 2016,
15 Maine's petition for reconsideration in 2017. Every one
16 of those agency processes requires a time consuming and
17 expensive round of comments. The resources of the Court
18 and of the parties would best be served by addressing
19 this key issue now.

20 The Court's decision on whether Maine and EPA must
21 recognize the tribal sustenance fishing use under the
22 Clean Water Act will constrain -- one way or the other,
23 however the Court rules, it will let EPA know the extent
24 of its discretion on any remand that might occur after
25 that. But that central question is not going to change.

1 It will be there whether there is a remand or not. And
2 so getting finality on that question now will be more
3 efficient than remanding it to the agency for another
4 round of agency proceedings and then, as my friend
5 Mr. Smith indicated, coming up here two years later to
6 litigate the same issue that is currently framed up
7 before this Court.

8 THE COURT: So I take it that your view is that
9 the Court should proceed to decide Count 2 of the
10 State's complaint, the Court should stay action with
11 respect to Count 1, but should not remand at this time
12 assuming -- not assuming. That then once the Court
13 reaches a decision with respect to Count 2 is it your
14 view then that the case then would be properly remanded
15 to EPA to consider its position?

16 So if I could just restate it, is it your position,
17 are you urging me to deny the motion with respect to
18 Count 2, grant the motion in part with respect to Count
19 1, and that part would be to simply stay proceedings
20 with respect to Count 1 but deny with respect to the
21 requested immediate remand; is that your view?

22 MR. ALBRIGHT: Your Honor, our position is the
23 Court should deny the voluntary remand in whole and that
24 the Court should proceed to adjudicate all the remaining
25 issues that are presently before the Court so that would

1 include both claims. If EPA -- EPA has indicated to
2 this Court that there was no legal error, that those are
3 lawful decisions. If EPA chooses not to defend aspects
4 of those decisions, the Houlton Band intends to do so
5 and to explain to this Court why they are indeed lawful
6 and valid.

7 It is not unusual for intervenors to defend
8 decisions when an agency may choose not to, and we
9 believe that is -- the best way to proceed is to
10 adjudicate all of those issues before the Court, and
11 then that would provide EPA the guidance for purposes of
12 future remand.

13 I would note my friend Mr. Carson suggested that the
14 agency may seek to revise the decisions through its
15 briefing. I would not understand that to be a lawful
16 action for an agency to take to attempt to actually
17 revise decisions that were made by the agency through a
18 court filing.

19 Now, they -- they may choose not to participate in
20 the briefing, but, as I indicated, we would intend to
21 explain to the Court why those decisions were lawful and
22 required under the Clean Water Act.

23 THE COURT: But why is it a -- a sound use of
24 the parties' resources and the Court's resources for --
25 to compel the EPA to defend rules it -- it has already

1 made plain it wants to change ostensibly as a matter of
2 policy, new leaders that have a different view,
3 different understanding. Why compel EPA to defend the
4 rules under Count 1 or to, as you sort of said, stand
5 silent with respect to defending the rules for purposes
6 of Count 1 while we litigate -- if we were, while we
7 litigate Count 2. Why would that be a good use of
8 anyone's resources?

9 MR. ALBRIGHT: Your Honor, it would be a good
10 use of the Court's and the parties' resources because it
11 would significantly expedite the ultimate resolution of
12 water quality standards in the State of Maine and the
13 implication -- excuse me, the implementation of
14 sufficient water quality standards to protect the fish
15 that the Houlton Band, the Penobscot Nation, and other
16 tribes in the state rely on.

17 That's the ultimate issue we're dealing with here.
18 There is a lot of procedural complexity that's involved,
19 but that's the central issue. And the more guidance
20 that -- that the Court can provide to the Court --
21 excuse me, to the agency and to the parties, the sooner
22 the better. Because the issues that are embedded within
23 the current claims, those issues are -- are not the --
24 the key issues are not going away.

25 And so whether or not EPA participates now, a ruling

1 on the merits would allow the agency, as it heads into
2 its remand process, to know whether or not there were
3 particular side boards on its exercise of discretion
4 that it would need to be following as it moves forward
5 with any change in policy that it might; although, we
6 don't know whether or not in fact we'll make any
7 changes.

8 THE COURT: Let me ask you this: You have
9 argued that the Department of Interior letter is -- the
10 changes between the 2018 and the 2015 opinions are not
11 material as to the issues presented here, and you have
12 criticized EPA's other justification for remand in this
13 case pointing to the fact that in its briefing it
14 characterizes that it might change its mind, it wants to
15 reexamine the issue, without really giving the Court any
16 vision of where it is going. Kind of like anyone's
17 guess.

18 If EPA was more concrete and said actually we're
19 thinking of going in the following direction, so it gave
20 us a preview, would that, in your view, be sufficient to
21 justify a remand in this case?

22 MR. ALBRIGHT: No, Your Honor, I don't believe
23 it would. Given the -- given the circumstances here,
24 which are unique, the agency has discretion -- excuse
25 me, has the ability to reconsider the -- reconsider

1 decisions but it is not unlimited. And the -- the
2 sequencing of events here the agency has had many years
3 through multiple administrations to consider these
4 issues, and both administrations have considered them
5 carefully, and -- and the new administration affirmed
6 the former administration.

7 As we move forward I think, as you say, we don't
8 know what the agency is going to do; but regardless of
9 -- of what it might do, there has been so much
10 vacillation about the agency's position that -- and,
11 again, that's no criticism of my friend Mr. Carson,
12 that's -- that's just what we're dealing with here --
13 that -- that it would bring a great deal of clarity, I
14 think, and help to crystallize the issues for the agency
15 as it moves forward to receive guidance from Your Honor
16 on these key issues.

17 THE COURT: Thank you.

18 MR. ALBRIGHT: If I may speak to the issue of
19 vacatur, Your Honor. We do not believe that -- that
20 that is an available remedy. That is a remedy that's
21 available when the Court actually finds an agency action
22 unlawful. It is a powerful remedy. Vacatur is
23 equivalent to a permanent injunction. It awards the
24 ultimate relief sought which is to do away with -- with
25 the decisions of EPA. So we do not believe that the

1 Court should even consider vacatur absent a merits
2 determination -- which of course is what, you know, EPA
3 seeks to avoid here -- and certainly not without
4 providing the Houlton Band and the Penobscot Nation and
5 EPA an opportunity to speak to the merits.

6 Even if vacatur might be available in some
7 circumstances on a voluntary remand, it wouldn't be
8 appropriate here. EPA has not confessed any legal
9 error. It has not identified any mistake, any problem
10 with its prior decision. And vacatur would do -- would
11 do harm to the public health, to the public interest.
12 Comments overwhelmingly supported the federal water
13 quality standards that were promulgated based on the
14 finding of the use -- designated use of sustenance
15 fishing.

16 And as we indicated in our briefing, and EPA did as
17 well, vacatur of that foundation for those federal water
18 quality standards would seriously disrupt and confuse
19 the entire regime in this state, and it would foment
20 more litigation by opening up those federal water
21 quality standards for attack whereas right now the
22 requirements are clear, and -- and so those federal
23 water quality standards are important to keep in place
24 and to not subject to -- to attack through -- through
25 vacatur.

1 THE COURT: Thank you.

2 MR. ALBRIGHT: Thank you, Your Honor.

3 THE COURT: Attorney Carson.

4 MR. CARSON: Yes, Your Honor, I would like a
5 little rebuttal. Thank you. Quickly on vacatur, Your
6 Honor. Maine has identified no -- I mean Maine has
7 suggested let's don't go to the merits in order to
8 decide whether the decision should be vacated. I think
9 all parties agree with that. Maine has suggested that
10 there is some error apparently simply because EPA is
11 seeking a remand to change its decisions, but it really
12 hasn't identified any. And I think that both when you
13 consider Mr. Boak's argument and Mr. Albright's argument
14 with respect to, you know, EPA hasn't said if there is
15 any problem you have to keep that in -- in the context
16 of the arbitrating capricious standard.

17 The arbitrating capricious standard fully recognizes
18 that where an agency has discretion there are different
19 ways that it could decide an issue that might even be
20 diametrically opposed to one another. That as long as
21 they are supported by the record, and as long as they
22 are reasonable, it is still not arbitrary and
23 capricious. I mean the Supreme Court has recognized
24 that an agency can change its mind.

25 And contrary to Mr. Smith's argument, under State

1 Farm the arbitrary capricious standard still applies in
2 that context. It is not some heightened level of
3 review. It is standard arbitrary and capricious
4 standard of review.

5 So here EPA hasn't conceded error. It is not
6 required to in order to get a remand. It -- it just
7 wants to exercise its discretion differently. So I -- I
8 do think that the Court would need to identify some type
9 of error before vacating.

10 And then when we get to the question of, you know,
11 what does it mean to keep this designated uses in place
12 vis-a-vis the human health criteria Maine kind of
13 muddies the issues a little bit there because, again,
14 designated uses are protected by criteria.

15 The criteria here are what we have called the Maine
16 rule which is the federally promulgated criteria that --
17 that EPA promulgated after disapproving Maine -- after,
18 rather, approving Maine's uses -- and I know Maine
19 contests that -- and then disapproving its human health
20 criteria because Maine didn't revise its own criteria.
21 EPA promulgated that. It is -- they have not -- it has
22 not been challenged before you. And all the parties
23 here appear to agree that those human health criteria
24 should remain in place during any remand, assuming there
25 is a remand.

1 And what Maine argues is that there is this question
2 of when you look at the use what does it mean? How are
3 they obtained? There is all these questions.

4 Well, the use is protected through the criteria, and
5 if the criteria are going to remain then there is simply
6 no real good reason to vacate the use decisions. And,
7 in fact, what would happen is -- we pointed out in our
8 reply -- if the Court were to do that then I think
9 pretty quickly you would have a challenge to the Maine
10 rule, which again all the parties appear to agree should
11 remain in -- in place during remand, because it -- the
12 use decisions are the fundamental underpinnings of -- of
13 that human health criteria rule.

14 So if you -- if you vacate the challenge decisions,
15 then we're just we're back in court on something else,
16 and the very thing that everyone agrees should remain in
17 place to protect water quality in -- in this interim
18 period is going to be embroiled in litigation, it is
19 going to take EPA away from the time it needs to come up
20 with new decisions on remand, and it would just be a
21 mess frankly. So they have provided no really good
22 reason to vacate.

23 THE COURT: Attorney Carson, would you remind me
24 how long of a period are you requesting the Court stay
25 the case?

1 MR. CARSON: Nine months, Your Honor. EPA
2 proposes to have four months to come up with proposed
3 decisions, one month for a public comment period, and
4 four months for a final decision. And -- and I would
5 also reiterate that, you know, Mr. Albright looked to
6 our reply brief and said well they equivocate. And if
7 -- if we equivocated at all, it is solely because EPA
8 intends to have a meaningful process on remand.

9 EPA's proposed decisions I guarantee you are going
10 to propose to materially change those areas that I spoke
11 about before in terms of its view of the -- of the
12 state's -- of the settlement acts in terms of creating a
13 designated use of sustenance fishing and the
14 interpretation of Maine's fishing use to include
15 sustenance fishing. That would be materially changed,
16 and however that is changed is going to -- is going to
17 dictate to some extent how EPA views the human health
18 criteria.

19 Those would be material proposed changes, and EPA
20 wants to have a meaningful process. I -- frankly I --
21 it, you know, remains to be seen, but at the end of the
22 day I still expect there is going to be material
23 changes; but -- you know, there will be a meaningful
24 process and it might be refined to some extent.

25 THE COURT: I think that this perhaps would be

1 the part of the transcript of this hearing that many of
2 us might look back on -- look at in the future when I
3 have asked you how long of a stay. Attorney Smith told
4 me it would not be two years before the case comes back.
5 You are indicating nine months.

6 MR. CARSON: Right.

7 THE COURT: How confident is EPA in its
8 representation to the Court that it can accomplish all
9 this in nine months?

10 MR. CARSON: That's the time period the EPA has
11 given me, Your Honor, so I have to rely on it.

12 THE COURT: Thank you.

13 MR. CARSON: The other thing, I guess, if I
14 could just get to, is this question of going forward on
15 the question what do the settlement acts mean in terms
16 of the tribes fishing rights and how does that equate to
17 water quality.

18 I -- I think it would be a substantial problem to
19 have the question of how whatever rights the tribes have
20 equate to particular water quality standards to be heard
21 before this Court while EPA intends to change its
22 decisions here because you invariably get intermixed
23 with this question of what does the Clean Water Act
24 require, and that's really -- you know, that's within
25 EPA's bailiwick, and it should have the opportunity to

1 look at that in the first instance here. And, again,
2 the question of what's the water quality standard and
3 what isn't is an area for which EPA has discretion.

4 THE COURT: Mr. Carson, help me understand why
5 EPA is not adopting the position that Mr. Smith argues
6 which is that the Court should go ahead and decide
7 Count 2 because that will invariably inform EPA's rule
8 making and decisions once the case is remanded so that
9 all will benefit if the Court were to adjudicate
10 Count 2, which is a question of law, rather than having
11 it go through rule making now, again, have the case come
12 back here, the Court would only then reach the Count 2
13 question. Tell me why you disagree with him on that
14 point?

15 MR. CARSON: I -- well, there are two things,
16 Your Honor. First, the question of -- I mean I kind of
17 look at it as kind of two different questions in terms
18 of what I think the tribes would like to have
19 adjudicated. One, as I understand it, they would like
20 to establish that they have -- that the settlement acts
21 provide a right to sustenance fish. That's something,
22 as I understand it, Maine contests. That's a legal
23 question that -- that frankly I don't know that it would
24 cause us any problem if that went forward solely on its
25 own.

1 When you get beyond that in terms of what does this
2 mean for water quality, what does it mean in terms of
3 the Clean Water Act, there is where it causes a problem
4 for EPA and it does so in two ways. One, the nine
5 months that I mentioned is probably out the window if
6 we're going to be involved in litigation over that in
7 this court during that same remand period. Two, again,
8 you know, what does and doesn't constitute a water
9 quality standard is something that EPA has discretion,
10 and I think EPA should be able to exercise that
11 discretion first. So that's kind of how I see that
12 playing out. I think it would be a problem to go
13 forward on this question of what's it mean for water
14 quality.

15 And another thing I would like to point out is, and
16 I just want to make sure that this is --

17 THE COURT: I'm sorry, I am not sure I followed
18 you. You see it as being a problem going forward on
19 what I am characterizing as Count 1 at this point, but
20 let me just bring you back to it again. Because I -- it
21 seems to me that there is a number of possibilities
22 here, and the most obvious would be to grant the motion,
23 everything is frozen, goes back to the agency, agency
24 gets to redetermine, nine months -- nine more months later
25 the case somehow reappears here, and we have a

1 scheduling conference, and we probably schedule a new
2 briefing.

3 Another is -- another approach is the -- Attorney
4 Smith's approach that he suggested, decide Count 2 first
5 because that's going to influence count -- what the
6 agency does on remand.

7 And then Attorney Albright argued, I think in a
8 third approach, which is decide everything before the
9 agency engages in any more rule making, decide
10 everything.

11 So going back to the Smith approach, which is decide
12 Count 2 first, give me -- give me your most direct
13 answer to why that is -- is or is not a sensible
14 approach here?

15 MR. CARSON: Again, it is -- it is not a
16 sensible approach in terms of the time it will take EPA
17 on remand because we're going to be on -- we would be
18 embroiled in litigation here over that question. EPA
19 would certainly want to be heard on it.

20 And, second of all, to the -- the -- the kinds of
21 questions they would like to litigate in terms of what
22 -- what is and what isn't a water quality standard, what
23 do these questions mean in terms of how it should play
24 out under the Clean Water Act, are things that are
25 within EPA's primary jurisdiction and that it intends to

1 address on remand, so we shouldn't be litigating those
2 issues first. There is a chance that EPA's decision on
3 remand could narrow the issues here and it might inform
4 what issues the tribes really feel that they need to --
5 need to raise.

6 So our proposal would be grant the remand, stay the
7 Penobscot Nation's -- if you allow the Penobscot Nation
8 to file its counterclaim at this time we don't -- we
9 don't care; but if you do, stay that and let's see where
10 we are and let's see what needs to be decided going
11 forward. Because the -- sorry.

12 In terms of going on forward on everything, frankly
13 I think that would just be --

14 THE COURT: Right.

15 MR. CARSON: -- again that would be chaos.

16 THE COURT: Going back to the -- your position
17 which is to grant the remand and -- without vacating the
18 underlying decisions and grant the tribes -- I'm sorry,
19 the Penobscot Nation's motion to file a counterclaim, is
20 it your view that your client and the State of Maine
21 should be obligated to answer that counterclaim during
22 the period of remand or is that -- would that not work?

23 MR. CARSON: Well, they don't propose to assert
24 any claims against EPA --

25 THE COURT: Right.

1 MR. CARSON: -- so I am not -- I am not certain
2 we would really have to -- have to provide a response to
3 it. I -- frankly, if we do I would prefer not -- I
4 would prefer not to during remand because I would have
5 to take a little closer look at their allegations,
6 but -- you know, some of those issues may or may not
7 fall out after EPA takes a position on remand, and I am
8 not sure that -- that EPA needs to address those
9 frankly.

10 THE COURT: All right. Thank you.

11 MR. CARSON: Thank you, Your Honor.

12 THE COURT: We've covered a lot of ground, and
13 so I think it would be appropriate to offer to each side
14 a few more minutes if you would like to make any final
15 comments. So, Attorney Boak, you would be up next, and
16 you can use your remaining two minutes however you wish.

17 MR. BOAK: Thank you, Your Honor. I will -- I
18 will try and get right to it. The -- the scenario two
19 of the split, my understanding of what the Penobscot
20 Nation is -- is asking with respect to their mirror
21 image of -- or -- or their inverse of the declaratory
22 relief is what Maine must do with respect to water
23 quality standards and its effect on water quality
24 standards, and Maine's position is that cannot be
25 adjudicated, it is not justiciable separate from an

1 action by EPA on the water quality standards because
2 that is in their discretion. So on that point I think I
3 would agree with Mr. Carson. Let me --

4 THE COURT: Attorney Boak, you have proffered
5 this question, then, why doesn't it become justiciable
6 if the -- if the Penobscot Nation asserts that it is
7 seeking injunctive relief that ultimately Maine has
8 responsibility to adopt water quality -- will have
9 responsibility to adopt water quality standards for all
10 this out -- how this all plays out, and that the
11 injunction would be in the nature of directing the State
12 of Maine to account for this right when, in the future,
13 it does engage in rule making?

14 MR. BOAK: Because it is not ripe until EPA will
15 take an action with respect to any water quality
16 standard that Maine would -- would implement. It has
17 already implemented these standards. These are things
18 that are -- that date back to the 1980s, and absent an
19 EPA decision on how -- on how that would affect an
20 approvable water quality standard under the Clean Water
21 Act is just not right.

22 I want to go to scenario three of remand, I guess,
23 or the scenario where everything gets remanded. Might
24 it be an abuse of EPA discretion given all that's
25 happened to date? Perhaps. The State again is just

1 looking at this from a pragmatic standpoint, it is
2 trying to protect the status quo.

3 In 2015 these new designated uses sprung forth into
4 life with EPA's actions, so the State is trying to
5 protect the status quo before that happened where for 30
6 plus years everybody adhered to Maine's standards as
7 they were without such a standard but also acknowledged
8 the status quo with respect to this criteria that's in
9 effect protecting the environment and the tribal
10 interests. That's what Maine thinks is the best way
11 forward if we're going to remand everything back to EPA.

12 Mr. Carson points to criteria as somehow fully
13 protective of all of the designated uses, and it is just
14 not so. Maine points out other contexts where
15 designated uses separate from criteria are relevant and
16 considered. And an easy way to think about it is with
17 respect to such things like fish passage or flow of
18 water that are separate from criteria affecting the
19 individual quality of the water. Those may come into
20 play in contexts that are live before Maine right now
21 with -- in situations involving things like Section 401,
22 water quality certifications. And so that's why Maine
23 thinks, from the Court's equitable jurisdiction, vacatur
24 while remanding everything of those two decisions would
25 be the best course going forward.

1 Mr. Carson also points out that that third decision
2 or the -- there could be a challenge to the rule. If
3 the Court left the third decision for the time being
4 intact, the ultimate disapproval that bases that
5 disapproval on the underlying underpinnings, the
6 designated use, if that is not vacated that would be a
7 backstop guard against any interim attack on this Maine
8 rule while EPA takes its action.

9 THE COURT: Thank you.

10 MR. BOAK: Thank you.

11 THE COURT: Attorney Smith.

12 MR. SMITH: Your Honor, I was remiss in not
13 acknowledging the presence of Chief Kirk Francis of the
14 Penobscot Nation, who is here today, along with general
15 counsel for the Penobscot Nation Mark Chavaree. I just
16 wanted to let you know that they are here.

17 This is a pretty extraordinary case, and I think it
18 is fair to say we live in extraordinary times, and in
19 extraordinary times courts may do things that are
20 somewhat unusual. And I wanted to clarify that the
21 Smith approach actually is the same as the Albright
22 approach with an alternative.

23 I believe that the Court should go full bore on this
24 case and decide it as presented. We already have the
25 merits brief from the State. Tribes can file their

1 merits briefs. EPA can decide what it wants to do or
2 not do. Counts 1 and 2 with our counterclaim can go
3 forward.

4 And I wanted to give the Court a citation to
5 situations where courts have proceeded when agencies
6 have bowed out like this. This admittedly was in an
7 appeal setting, we didn't have a voluntary remand motion
8 pending; but I think the gist of these cases are on
9 point. Watersheds Project versus Kraayenbrink which is
10 632 F.3d at 472 where the agency bowed out on appeal,
11 intervenors took over. And it cites interestingly the
12 Kootenai Tribe of Idaho versus Veneman, which is 313
13 F.3d 1094, holding that intervenors could appeal
14 injunctive relief and defend an agency action after the
15 agency decided not to do so. So we have precedent for
16 proceeding exactly as Mr. Albright and I suggest that
17 you proceed.

18 With respect to our counterclaim. As Your Honor
19 observes, we're asking for declaratory -- or injunctive
20 and/or declaratory relief. And this is not at all
21 intertwined with the requirements of the Clean Water Act
22 or what water quality -- the technicalities of water
23 quality standards. This is a pure question of law about
24 whether what this fishing right carries with it is a
25 right to water quality of -- to support fish to nourish

1 tribal members. It is very simple. And the -- the
2 First Circuit has laid out the standards for when a
3 declaratory -- you can have declaratory or injunctive
4 relief is what we're requesting here.

5 And I would commend the Court to Rhode Island --
6 again these tribal cases crop up. Rhode Island versus
7 Narragansett Indian Tribe, 19 F.3d at 685, which was
8 actually well summarized in a Judge Woodcock decision
9 U.S. -v- Seger 849 F. Supp.2d 76.

10 Essentially there is the -- there is the basically
11 Article III standing question that there has to be
12 fitness and hardship. Fitness inquiry concerns
13 questions of finality, definiteness, the need for
14 further factual development. We don't have any need for
15 that here, everything is crystallized.

16 Under hardship the Court should consider whether the
17 challenged action creates a direct and immediate dilemma
18 for the parties. These inquiries are highly fact
19 specific. But at the bottom line is whether the court's
20 determination would serve a useful purpose, and clearly
21 this Court's determination on this very central question
22 of what a sustenance fishing right carries with it in
23 terms of water quality to nourish tribal members in
24 their use is going to be a useful purpose.

25 So we -- we need not meld into Clean Water Act, we

1 have a straightforward federal Indian law question. And
2 it is well articulated, in fact, by the State's request
3 for declaratory relief which is in ECF 118 when they ask
4 for their declarations. They ask for a declaration
5 under the clean -- 1980 Acts for environmental
6 regulatory purposes they ask for a declaration that the
7 law does -- essentially the law does not require that
8 Maine adopt any special rights or protections for water
9 quality for members of the Maine tribes or in Maine --
10 or in Indian waters. Quote, no part of the Maine Indian
11 Act -- Indian Claims Settlement Act including 62074,
12 which is the sustenance right -- fishing right for the
13 Penobscot Nation, or any of the settlement act
14 provision, quote, constitutes a designated use for any
15 Maine waters or group or requires a heightened quality
16 of water for fishing in Maine waters. It is as simple
17 as that.

18 THE COURT: Thank you. Attorney Albright.

19 MR. ALBRIGHT: Thank you, Your Honor. I would
20 like to address two points briefly. On the question of
21 vacatur, I previously argued why we don't believe that's
22 available and why it would be very disruptive here. My
23 friend Mr. Boak mentioned that Maine's interest is in
24 the status quo. If -- if that was the interest of
25 Maine, and that was the sole interest in what they are

1 pursuing, they would have moved for a preliminary
2 injunction in 2015 to preserve the status quo and to
3 enjoin preliminarily those decisions by EPA. Maine did
4 not do that. If they would have, we would have all had
5 an opportunity to brief likelihood of success on the
6 merits. And now they are asking the Court to actually
7 vacate those decisions, which is full relief on the
8 merits, without any evaluation of those merits having
9 been completed.

10 The second point I would like to address is in the
11 event this Court were to grant a remand, the Houlton
12 Band would ask -- believes that the most appropriate
13 course of action would be for the Court to require
14 periodic status reports with the first one coming after
15 six months, and then every 90 days after that, but
16 without setting a specific time limit on remand. This
17 is what the First Circuit did in the Central Maine Power
18 Company versus FERC case which is 252 F.3d 34 from 2001.

19 And the reason why we do not believe the Court
20 should set a specific time limit on remand is because it
21 would require a very robust -- robust process. These
22 decisions have been confirmed twice by two different
23 administrations, and if there are going to be changes
24 there is going to need to be a very hard look. That is
25 going to require notice and comments, and it is also

1 going to require government-to-government consultation
2 with the tribes. That's something that in fact that
3 Interior flagged in its 2018 letter, that consultation
4 with the Houlton Band would be appropriate.

5 EPA proposes that all of this can happen in nine
6 months where they get four months to draft their
7 proposal and four months to consider comments. That
8 leaves one month for the Houlton Band and others to
9 comment on what would be a significant potentially
10 change, and that's not a realistic timeline.

11 The Houlton Band is not going to know what
12 information is going to be useful until EPA publishes a
13 proposed decision; and, two, after there is consultation
14 regarding those issues.

15 So the proposal that EPA is making would require the
16 Houlton Band to scramble to try to put together
17 comments, to try to understand what information is going
18 to be most useful, to engage in government-to-government
19 consultation, and have that all happening within one
20 month.

21 We do not believe that that is a realistic schedule,
22 and that it would severely prejudice our client and
23 their ability to participate meaningfully in a process
24 that could potentially have a significant impact on the
25 Houlton Band's members' ability to engage in sustenance

1 fishing in the Meduxnekeag for generations to come and
2 for the health of those fish in the future.

3 THE COURT: Thank you, Attorney Albright.

4 MR. ALBRIGHT: Thank you, Your Honor.

5 MR. CARSON: Very quickly, Your Honor, may I
6 address just two things?

7 THE COURT: Go ahead.

8 MR. CARSON: One -- I guess three things, I'm
9 sorry. One, Mr. Boak talked about the designated use
10 and things like 401 certifications, and he mentioned
11 fish passage and flow of water. The designated use at
12 question here, sustenance fishing, as -- as EPA
13 determined and approved in Maine standards, has nothing
14 to do with those issues. It solely has to do with human
15 health from fish consumption. That's all it has to deal
16 with. And so that's what the federal criteria protect.
17 So vacating the designated uses here will not help Maine
18 at all with respect to those because it has nothing to
19 do with it.

20 Two, this question of going forward where agencies
21 have bowed out. EPA is not bowing out here at all. It
22 just wants to change its decisions and have whatever
23 challenge that we'll have to those decisions down the
24 road.

25 In terms of the schedule, I mean again EPA thinks it

1 can do this in 90 days. I am -- I suspect it will be
2 happy if the Court --

3 THE COURT: Nine months.

4 MR. CARSON: Nine months, I'm sorry. I suspect
5 that it would be just as happy to -- to have an
6 unlimited remand, but we think -- we think nine months
7 is -- is -- is reasonable. And if the Court were to
8 require status reports in that nine-month period, I
9 would suggest, frankly, one after the first four months,
10 which is when EPA intends to have its proposed decision,
11 one a couple months after that after EPA receives all
12 the comments, and then they will have a decision at the
13 end.

14 And, you know, if -- if the tribes don't think that
15 30 days is sufficient time for them to comment, then --
16 you know, if we knew there were going to be a remand
17 here, I suspect that that's something that EPA would be
18 happen -- you know, the parties could confer upon
19 whether 30 days is enough. If it is more than 30 days,
20 frankly I think then it would probably be -- you know,
21 if it were 60 days, for instance, then I think we would
22 be talking ten months.

23 Don't want to -- I don't want to truncate anyone's
24 time for comment, that's really a decision for EPA to
25 make. So I just kind of throw that out there that I --

1 I think we would be probably happy to confer, but I
2 think EPA will still need the four months after whatever
3 that comment period of time is.

4 THE COURT: Thank you, Attorney Carson.

5 MR. CARSON: Thank you.

6 THE COURT: The case presents, at this point,
7 some very interesting questions, and I intend to
8 diligently but carefully examine them further before I
9 issue a decision. It will be a written decision. I
10 want to thank the attorneys for their efforts today.
11 For those of the parties that appeared today, thank you
12 for being here today. And with that court will be in
13 recess.

14 (End of proceedings.)

15 (TIME NOTED: 11:55 a.m.)

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Tammy L. Martell, Registered Professional
Reporter, Certified Realtime Reporter, and Official
Court Reporter for the United States District Court,
District of Maine, certify that the foregoing is a
correct transcript from the record of proceedings in the
above-entitled matter.

Dated: November 21, 2018

/s/ Tammy L. Martell

Official Court Reporter